

A **Assahari bin Daud, Wakil Diri Bagi v
Meriam bte Ishak & Ors**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02-558 OF 2001
ABDUL KADIR SULAIMAN, ABDUL AZIZ JJCA AND JAMES FOONG J
4 JUNE 2004

Civil Procedure — Judgments and orders — Amendment of — Jurisdiction of Court of Appeal to correct order of High Court judge — Courts of Judicature Act 1964 s 69 (4), (5)

C *Road Traffic — Negligence — Fatal accident — Appeal — Finding by High Court judge that first defendant solely to be blamed for accident — Whether any merit in appeal*

Tort — Negligence — Road accident — Appeal — Finding by High Court judge that first defendant solely to be blamed for accident — Whether any merit in appeal

D The car driven by Assahari bin Daud ('AD') was involved in a collision with a bus driven by the second defendant and owned by the third defendant in a road accident at Kampung Pasir Putih, Merchang, Terengganu. In this motor accident, two other vehicles were involved. AD died in the accident. Four suits were filed in connection with the said road accident. Subsequently, the four suits were consolidated.

E The personal representative of AD was the first defendant in the consolidated suit. The second and third defendants brought in the third party, who was the administrator of the estate of AD.

F The learned High Court judge held that the effective cause of the accident was due to sudden swerving of AD's car into the path of the bus. The judge found that the bus driver had exercised ordinary care and skill so as to avert the collision and that he did not contribute towards the accident. Accordingly,
G the learned High Court judge found AD solely to be blamed for the accident and affixed 100% liability against him. The learned judge held the third party wholly liable in the third party proceeding instituted by the second and the third defendants.

H This was the appeal by the first defendant. The third party did not lodge any appeal against the High Court decision.

Held, dismissing the appeal:

I (1) Based on the finding by the High Court judge that AD was solely to be blamed for the accident and with the learned counsel for the appellant conceding on that finding, there was no merit in the instant appeal (see para 7).

- (2) Although the learned High Court judge had absolved the second and third defendants of liability, he went on to hold the second and third defendant jointly and severally liable in respect of the claim brought by the other plaintiffs who did not sue the first defendant. In the light of the attachment of the 100% liability on AD, the finding of the learned judge appeared to be irreconcilable and wrong in law (see paras 11 and 13).
- (3) Since the purpose of a third party proceeding was for the losing defendant to recover indemnity from the third party over the fault created by the third party and since the second and third defendants were held not to be blamed for the accident, the issue of liability against the third party for indemnity should not have arisen (see para 14).
- (4) Section 69(4) and (5) of the Courts of Judicature Act 1964 ('the Act') enabled this court to correct the error committed by the learned High Court judge in attaching liability against the second and the third defendants as well as the third party by way of indemnity, notwithstanding that there was no appeal by any of them (see para 15).
- (5) Having considered the provisions of the Act and in the light of the learned judge's primary finding that AD was wholly to be blamed for the accident, it was clearly erroneous and against the weight of the evidence to enter judgment against the second and third defendants and make the third party indemnify the second and third defendants. To that extent, the orders of the learned High Court judge made against the second and the third defendants and the third party were quashed (see para 16).

[Bahasa Malaysia summary]

Kereta yang dipandu oleh Assahari bin Daud ('AD') terlibat dalam perlanggaran dengan sebuah bas yang dipandu oleh defendan kedua dan dimiliki oleh defendan ketiga dalam kemalangan jalan raya di Kampung Pasir Putih, Merchang, Terengganu. Dalam kemalangan ini, dua lagi kenderaan terlibat. AD mati didalam kemalangan tersebut. Terdapat empat guaman yang difailkan berhubung dengan kemalangan tersebut. Guaman-guaman ini kemudiannya disatukan.

Wakil diri AD adalah defendan pertama di dalam guaman yang disatukan ini. Defendan kedua dan ketiga membawa pihak ketiga, iaitu pentadbir harta pesaka AD.

Yang arif hakim Mahkamah Tinggi memutuskan bahawa kemalangan ini disebabkan oleh kereta AD yang dengan secara tiba-tiba membelok masuk ke jalan bas tersebut. Hakim mendapati yang pemandu bas tersebut telah menggunakan ketelitian dan kemahiran yang biasa bagi mengelak dari perlanggaran tersebut dan bahawa beliau tidak menyumbang kepada kemalangan tersebut. Oleh yang demikian, yang arif hakim Mahkamah Tinggi mendapati yang AD

A

B

C

D

E

F

G

H

I

A bertanggungjawab sepenuhnya terhadap kemalangan tersebut dan menetapkan 100% liabiliti terhadapnya. Yang arif hakim memutuskan yang pihak ketiga bertanggungjawab sepenuhnya di dalam prosiding pihak ketiga yang dibawa oleh defendan kedua dan ketiga.

B Ini merupakan rayuan oleh defendan pertama. Pihak ketiga tidak memfailkan sebarang rayuan terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan:

C (1) Berdasarkan pendapat hakim Mahkamah Tinggi yang bahawa AD bertanggungjawab sepenuhnya terhadap kemalangan tersebut dan peguam perayu mengakuinya, tiada merit di dalam rayuan semasa (lihat perenggan 7).

D (2) Walaupun yang arif hakim Mahkamah Tinggi membebaskan liabiliti defendan kedua dan ketiga, beliau memutuskan yang bahawa defendan kedua dan ketiga secara bersama dan berasingan bertanggungjawab terhadap tuntutan yang dibawa oleh plaintif-plaintif yang lain yang tidak menyaman defendan pertama. Keputusan yang arif hakim tampak tidak selaras dan salah di sisi undang-undang, memandangkan liabiliti 100% yang diletakkan pada AD (lihat perenggan 11 dan 13).

E (3) Memandangkan tujuan prosiding pihak ketiga adalah untuk defendan yang kalah mendapat tanggung rugi dari pihak ketiga berhubung dengan kesalahan yang dibuat oleh pihak ketiga dan oleh kerana defendan kedua dan ketiga tidak diputuskan bertanggungjawab terhadap kemalangan tersebut, isu liabiliti terhadap pihak ketiga untuk ditanggung rugi tidak wajar dibangkitkan (lihat perenggan 14).

F (4) Seksyen 69(4) dan (5) Akta Mahkamah Kehakiman 1964 ('Akta tersebut') membolehkan mahkamah untuk membetulkan kesilapan yang dibuat oleh yang arif hakim Mahkamah Tinggi dalam meletakkan liabiliti pada defendan kedua dan ketiga dan juga pihak ketiga melalui tanggung rugi, walaupun tiada rayuan dari mereka (lihat perenggan 15).

G (5) Setelah menimbangkan peruntukan-peruntukan Akta tersebut dan berdasarkan pendapat primer yang arif hakim bahawa AD bertanggungjawab sepenuhnya dalam kemalangan tersebut, ianya jelas silap dan bertentangan dengan keterangan untuk memasukkan penghakiman terhadap defendan kedua dan ketiga dan untuk membuat pihak ketiga menanggung rugi defendan kedua dan ketiga. Oleh yang demikian, perintah-perintah yang arif hakim terhadap defendan kedua dan ketiga dibatalkan (lihat perenggan 16).]

I Notes

For cases on amendment of judgments and orders, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3440–3441.

For cases on fatal accident, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 379–390.

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1056–1288.

For judgments and orders generally, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.9-001]–[10.9-026].

Legislation referred to

Courts of Judicature Act 1964 s 69(4), (5)

CM Maran (VP Nathan & Partners) for the appellant.

Indran Rajalingam (Zamani, Othman Bakar, Harpal Singh Grewal, Avinder Singh Gill, Jasvinjit Singh and Joseph Au with him) (AJ Ariffin Yeo & Harpal, Omar & Joseph Au, Zamani Mohammad & Co and Sandu & Co) for the respondents.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] This is an appeal by the personal representative of a deceased motor car driver, Assahari bin Daud, whose car was involved in a collision with bus No TK 7238, driven by the second defendant and owned by the third defendant in a road accident at Kampung Pasir Putih, Merchang, Terengganu near kilometer 48¾ Jalan Kuala Terengganu/Dungun on 19 June 1993, in a consolidated Suit No 23–01 of 1996. In this motor accident, four vehicles in all were involved, including the said motor car and the said bus. Three of the vehicles were traveling north from the direction of Dungun towards Kuala Terengganu, and the motor bus was traveling in the opposite direction. The three vehicles traveling in the northerly direction were the motor car No CG 7110, motor van No DJ 3225 and motor trooper No TH 5000. The driver of the motor car died in the accident.

[2] Altogether four suits were filed in connection with the said road accident, one in the High Court at Kuala Terengganu and three in the lower courts at Kuala Terengganu. They were:

- (a) High Court Civil Suit No 23–3 of 1994
- (b) Sessions Court Summons No 53–95 of 1995
- (c) Magistrates Court Summons No 73–89 of 1995
- (d) Magistrates Court Summons No 73–99 of 1994

[3] Subsequently, all cases above came before the High Court for consolidation and all the four suits became a single High Court Civil Suit No 23–01 of 1996 (‘the consolidated Suit’). The original plaintiffs in (a) above become the first, second, third and fourth plaintiffs respectively. The plaintiffs in (b) become the fifth, sixth, seventh, eighth and ninth plaintiffs, respectively. The plaintiffs in (c) become the tenth and eleventh plaintiffs, respectively, and the single

- A** plaintiff in (d) above becomes the twelfth plaintiff in the consolidated Suit. The appellant who was the first defendant in (a) above remains so in this consolidated Suit. The other two defendants in (a), (b), (c) and (d) above are now the second and third defendants in the consolidated Suit. The third party, Mek Ragayah binti Salleh (as the administrator of the estate of the deceased car driver) in (a), (b), (c) and (d) above now becomes the third party in the consolidated Suit.
- B**

[4] This consolidated Suit came on for hearing before the learned judge. At the end of the hearing this is what he says in his grounds of judgment in relation to the liability of the parties in the consolidated Suit:

- C**
- 19 On liability

D For reasons given above, I find that the car driver was solely to be blamed. It follows, therefore, that *with regard to claim by first plaintiff, second plaintiff, third plaintiff, fourth plaintiff, tenth plaintiff, and eleventh plaintiff*, first defendant is wholly liable. Accordingly, I enter judgment against first defendant.

20 However, *with regard to claim by the other plaintiffs (who did not sue first defendant)*, second defendant and third defendant are jointly and severally liable. Accordingly, I enter judgment against both first and second defendant.

- E** 21 *With reference to third party proceeding instituted by second and third defendant*, third party is wholly liable, hence I enter judgment against third party.

[Emphasis added].

- F** **[5]** Having fixed the various liabilities on the parties concerned this is what the learned judge says in relation to the quantum of damages to be awarded to the various plaintiffs in the consolidated Suit:

22 On quantum

- G** In the light of no objection by En Joseph Au, counsel for second defendant and third defendant and based on submission by the parties, I order as follows:

As against first defendant:

H	Plaintiff No 1	
	Special damages	RM 5,019
I	Dependency claim:	
	Pre-trial	RM30,000
	Post trial	RM29,000

Plaintiff No 2	
Special damages	RM 100
General damages	RM10,000
Plaintiff No 3	
Special damages	RM 1,100
General damages	RM10,000
Plaintiff No 4	
Special damages	RM 100
General damages	RM13,000
Plaintiff No 10	
Special damages	RM1,900
General damages	RM2,000
Plaintiff No 11	
Special damages	RM 140
General damages	RM3,500

As against second and third defendant:

Plaintiff No 5, 6, 7, 8, 9	
Special damages (general items)	RM 5,899
(agreed)	
Plaintiff No 5	
General damages	RM 2,500
Bereavement (for three persons) (RM10,000 each)	RM30,000
Dependency claim:	

A**B****C****D****E****F****G****H****I**

A	Pre-trial	RM37,800
	Post trial	RM30,600
B	Plaintiff No 6 (Nornashuha)	
	General damages	RM36,000
C	Plaintiff No 7 (Norshuhada)	
	General damages	RM11,000
D	Plaintiff No 8 (Norfarah Hanim)	
	General damages	RM 9,000
E	Plaintiff No 9 (Azimah)	
	General damages	RM 2,500
F	Plaintiff No 12	
	Special damages	RM 2,870
	General damages	RM56,000

23 Interest will be at 8% pa on general damages from date of service of writ to date of realization and 4% pa on special damages from date of accident to date of judgment and thereafter at 8% pa to date of realization.

G 24 In the light of no objection by En Omar, counsel for first defendant and third party and based on submission by En Joseph Au, counsel for second and third defendant, I order that in respect of damages and costs obtained by fifth plaintiff, sixth plaintiff, seventh plaintiff, eighth plaintiff, ninth plaintiff and twelfth plaintiff against second and third defendant to be borne by third party.

H **[6]** Against this decision by the learned judge, Daud bin Yahya wakil diri bagi (the personal representative of) Assahari Bin Daud, the first defendant in the consolidated Suit by a notice dated 29 June 2001 filed this appeal. At the hearing of the appeal the appellant was represented by counsel, En CM Maran. There was also a cross appeal by the five plaintiffs in original suit No 53-95 of 1995 mentioned in para 2(b) above, who are the fifth to the ninth plaintiffs in the consolidated Suit. We say no more about this cross appeal because at the proceeding before us, En Harpal, learned counsel for the said plaintiffs

withdrew the cross appeal and requested for no order be made on costs. The cross appeal was accordingly, struck off with no order made as to costs.

[7] On the appeal proper, it is to be noted that the appellant is the first defendant in original suit No 23–3 of 1994 mentioned in para 2(a) above and in this consolidated Suit. He was sued as personal representative of the deceased driver of the car involved in the accident on that fateful day. On the evidence before the learned judge, with whose finding on liability we agree, we find no merit in the appeal on the finding that he was solely to be blamed for the accident. Coupled with that, the learned counsel before us also conceded on the finding by the learned judge. In the circumstances, there was nothing left for us but to dismiss the appellant's appeal with costs to the first, second, third, fourth, tenth and eleventh plaintiffs in the consolidated Suit.

[8] But that is not the end of the matter. The third party in the consolidated Suit, Mek Ragayah binti Salleh was brought in by the second and third defendants in her capacity as the administrator of the deceased driver's estate, and the first defendant in the consolidated Suit, Daud bin Yahya, who is the appellant here, was being sued by the various plaintiffs in his capacity as the personal representative of the deceased driver. So both of them are involved in the affairs of the same deceased driver of the car, Assahari bin Daud. However, the third party did not lodge any appeal against the decision of the learned judge in this consolidated Suit holding her wholly liable in the third party proceeding instituted by the second and the third defendants. It is unfortunate that upon the grant of the letters of administration over the estate of the deceased driver to the third party, no attempt was made by the plaintiffs in original Suit No 23–3 of 1994 mentioned in para 2(a) above to substitute the appellant who originally stood in the capacity of the personal representative of the deceased driver with that of Mek Ragayah binti Salleh in the capacity of the administrator, as the first defendant in the suit.

[9] Be that as it may, according to the learned judge in his judgment, addressing his mind upon the accident that happened on that day, the effective cause of the accident was due to sudden swerving of the car into the path of the bus. 'The bus driver applied brakes and swerved. On the facts and circumstances of instant case, I am satisfied that the bus driver had exercised ordinary care and skill so as to avert the collision.' The learned judge continues:

It is my conclusion that with the bus going at the speed of 60 km per hour, it did not contribute towards the accident.

[10] He disagreed with the contention that the bus was speeding. To him it could be due to the bus going out of control on wet surface. It is to be noted that the accident happened after a drizzle causing the road surface to be wet. For those reasons, the learned judge found that the motor car driver who was the first defendant in the court below and the appellant before us, was solely to be blamed and affixed 100% liability on the motor car driver in favour of

A

B

C

D

E

F

G

H

I

A the first, second, third, fourth, tenth and eleventh plaintiffs in the consolidated Suit, who were respectively, the first to the fourth plaintiffs in original suit No23–3 of 1994 and the first and second plaintiffs in original suit No 73 –89 of 1995, mentioned in para 2(a) and (c) above, respectively.

B [11] Having absolved the bus which driver and its owner are being sued as the second and third defendants in the consolidated Suit, of liability consequent upon the collision with the motor car, with no reason given, the learned judge made a finding as found at paras 20 and 21 of his judgment cited earlier, thus:

C 20 However, with regard to the claim by the other plaintiffs (who did not sue first defendant), second defendant and third defendant are jointly and severally liable. Accordingly, I enter judgment against both first and second defendant. (Quaere: whether the learned judge meant the second and the third defendants in his last sentence?)

D 21 With reference to third party proceedings instituted by second and third defendant, third party is wholly liable, hence I enter judgment against third party.

[12] Lest we forget, the first defendant is the appellant before us, the second defendant is the bus driver and the third defendant is the bus owner. The other plaintiffs who did not sue the first defendant are:

- E** (a) the fifth to the ninth plaintiffs in the consolidated Suit who are the first to the fifth plaintiffs in the original suit No 53–95 of 1995, mentioned in para 2(b) above; and
- (b) the twelfth plaintiffs in the consolidated Suit who is the sole plaintiff in the original suit No 73–99 of 1994 mentioned in para 2(d) above.
- F**

All these plaintiffs sued only the bus owner and the driver.

G [13] In the light of the attachment of the 100% liability on the motor car driver, who was represented by the appellant as the first defendant in the consolidated Suit, thereby absolving the bus driver and its owner of the blame over the accident, the finding of the learned judge in his para 20 mentioned earlier seemed to be irreconcilable and wrong in law. Was the reason for making the second and the third defendants jointly and severally liable so as to benefit the other plaintiffs who did not sue the first defendant, the appellant? If the learned judge was correct in entering ‘judgment against both first and second defendant’ in favour of these plaintiffs, what about the third defendant, the bus owner?

H

I [14] Again for no reason given, para 21 of the learned judge’s judgment attaches liability on the third party who is not the appellant before us, having held earlier that the bus is not to be blamed for the accident. The purpose of a third party proceeding is for the losing defendant to recover indemnity from the third party over the fault created by the third party. However in this case,

as the bus was held not to be blamed for the accident the issue of liability against the third party for indemnity would not have arisen.

[15] Our attention is drawn to the provisions of s 69 (4) and (5) of the Courts of Judicature Act 1964 so as to correct the error committed by the learned judge in attaching liability against the second and the third defendants (the bus driver and its owner) and also against the third party (the administrator of the estate of the deceased motor car driver) by way of indemnity, notwithstanding the absence of any appeal by them over the decision. The said sub-sections state:

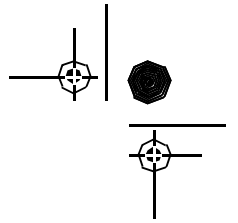
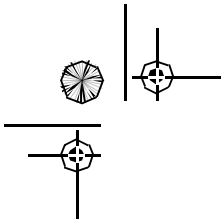
(4) The Court of Appeal may draw inferences of facts, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision.

[16] Having considered the provisions of the section of the Act and in the light of the learned judge's primary finding that the deceased motor car driver (represented by the appellant in this case and having conceded by the learned counsel as to such finding) was wholly to be blamed in respect of the accident, we find that the entry of judgment against the bus driver and the bus owner and making the third party to indemnify the bus driver and the owner, is clearly erroneous in law and against the weight of the evidence. To that extent, the order of the learned judge made against the second and the third defendants and the third party has to be quashed.

[17] My learned brother Abdul Aziz bin Mohamad, JCA and James Foong Cheng Yuen, JHC have read this judgment in draft and stated that they concurred with the reasoning and the conclusion.

[18] In the upshot, since the appellant is only involved in the original suits No 23-3 of 1994 and 73-89 of 1995 mentioned in paras (a) and (c) above he is wholly liable to the respective plaintiffs therein only, who are the first, second, third, fourth, tenth and eleventh plaintiffs in the consolidated Suit. The liability and the quantum of damages awarded therein by the learned judge are accordingly affirmed. The appellant's appeal herein is dismissed with costs to the said plaintiffs in the light of the concession made as to the correctness of the decision of the learned judge with which we agree. The decision of the learned judge, however, as against the first and second defendants in the original suits No 53-95 of 1995 and 73-99 of 1994 mentioned in paras (b) and (d) above being the bus owner and its driver respectively, and the decision as against the third party for indemnity in favour of the plaintiffs therein are accordingly quashed as to both liability and quantum. As to costs, we make



A no order on the appeal but the orders for costs against them in the court below are hereby set aside.

Appeal dismissed.

Reported by Lim Lee Na

B

C

D



E



F

G

H

I

